

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 08 March 2006**

**BALCA Case No.: 2005-INA-00153**  
**ETA Case No.: P2002-CA-09537056/JB**

*In the Matter of:*

**K&L PRECISION GRINDING CO., INC.,**  
*Employer,*

*on behalf of*

**KEMALJ AKSABANOVIC,**  
*Alien.*

Appearances: Zaheed B. Kajani, Esquire  
Los Angeles, California  
*For the Employer and the Alien*

Certifying Officer: Martin Rios  
San Francisco, California

Before: **Burke, Chapman and Vittone\***  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Machinist.<sup>1</sup> The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

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\* Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

<sup>1</sup> Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal

## **STATEMENT OF THE CASE**

On April 12, 2001, Employer, K&L Precision Grinding, Co., Inc., filed an application for labor certification to enable the Alien, Kemalj Aksabanovic, to fill the position of Machinist. (AF 25). The position required two years of experience in the job offered. The job duties included set up and operation of conventional, special-purpose, and numerical control (NC) machines and machining centers to fabricate metallic and non metallic parts. The job duties also included the requirement that the worker "[c]alculate and set controls to regulate machining factors, such as speed, feed, coolant flow and depth and angle of cut, enter commands to retrieve, input or edit computerized machine control media."

On July 15, 2004, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification on the basis of the rejection of four U.S. workers for other than lawful, job-related reasons. (AF 21). Specifically, the CO found that the U.S. workers appeared to have been potentially qualified for the position. Employer was directed to discuss the job history of each and explain why, based on their resumes alone, the applicants were found not even potentially qualified for the position. The CO also raised specific questions with regard to each particular resume, to which Employer was directed to respond. With regard to Applicant #2, the CO noted that Employer had indicated he had no set-up experience for high-volume production, the question being why he was rejected for this when it was not a requirement listed on the ETA 750A. With regard to Applicant #3, the CO questioned why Employer stated he had no experience with CNC lathes when his resume showed that he worked on CNC mills and lathes for Hardman Air Specialties.

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file ("AF") and any written arguments. 20 C.F.R. §656.27(c). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Employer submitted rebuttal on August 10, 2004. (AF 17). Employer argued that Applicant #2 was interviewed and he had no experience in handling high volume production. As Employer ran high volume production machines, to hire someone without that experience would jeopardize its business. According to Employer, its job description included the requirement to "calculate and set controls to regulate machining factors, such as speed, feed, coolant, flow and depth," which covered this duty requirement, and the applicant was rejected for lawful job related reasons. Applicant #3 lacked experience on CNC lathes although he had experience in CNC milling. As the experience he lacked was a core duty, he was lawfully rejected.

A Final Determination was issued on September 28, 2004. (AF 8). The CO denied certification, finding that the rejection of Applicants #2 and #3 remained at issue. With regard to Applicant #2, the CO rejected Employer's argument that high volume production experience was included in the job description because it required that the applicant "calculate and set controls to regulate machine factors such as speed, feed, coolant flow and depth." According to the CO, this applicant did have the experience required in the ETA 750A, which was experience in setting up and operating conventional, special-purpose, and numerical control machines. Applicant #3 was rejected for lacking experience in CNC lathes, however, the CO found that Employer's information contradicted the applicant's resume, which listed experience as a CNC machinist working with CNC mill and lathe machines. Additionally, the NOF had specifically questioned why Employer had indicated the applicant was rejected for lacking experience with CNC lathes when his resume showed work on CNC mills and lathes for Hardman Air Specialties and Employer made no reference to this in rebuttal. Finding that these two applicants were rejected for other than lawful, job-related reasons, certification was denied.

Employer requested review of the denial in on October 28, 2004. (AF 1). The CO issued a denial of the Request for Reconsideration on December 3, 2004,<sup>2</sup> and this matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 7).

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<sup>2</sup> The record does not appear to contain a request for reconsideration.

## **DISCUSSION**

In the Request for Review of Denial of Alien Employment Certification dated October 25, 2004 and signed by Employer's president, it is argued that high volume is a normal part of the duty requirement for a machinist and is not restrictive. Additionally, Employer for the first time responded directly to the question raised with regard to Applicant #3's experience with Harman Air. Our review, however, is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §656.27(c). *See also* 20 C.F.R. §656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989). Therefore, Employer's belated attempt to provide additional rebuttal will not be considered herein.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Company*, 1987-INA-615 (July 18, 1988) (*en banc*). An employer cannot lawfully reject an applicant who meets the minimum requirements but fails to meet an undisclosed requirement. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991)(*en banc*). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*).

Applicant #2 listed experience as a CNC machinist from 1978 to 1997, and as a CNC programmer in 1991, as well as experience from 1978 to present on CNC machines, lathe, grinders and mills. (AF 168-169). Employer indicated this applicant was rejected because he had no set-up experience for high-volume production. When the CO specifically questioned the

Employer about its reason for rejection of this applicant, and about why this requirement was not on the ETA 750A, the Employer responded in rebuttal that the requirement in the ETA 750A that applicants “read and set controls to regulate machining factors, such as speed, feed, coolant flow and depth,” included this duty. In its request for review, the Employer contends that the job description was in conformance with the Dictionary of Occupational Titles, and that high volume is a normal part of the job requirement. The Employer cannot have it both ways. If “high volume” is a normal part of the job requirement, it is not credible that this applicant, who has nearly twenty years of experience as a machinist, does not have the necessary experience. Conversely, if “high volume” is not a normal part of the job requirement, then the Employer did not list the particular requirement for which this applicant was rejected.

This applicant clearly meets Employer's minimum stated requirements, as set forth in the ETA 750A. That he may have failed to meet Employer's unstated requirement is not a valid reason for his rejection. *See Jeffrey Sandler, M.D., supra.* Labor certification was properly denied, the remaining issue need not be addressed and the following Order shall issue.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when

full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.